Supreme Court, U.S.
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No. 97-624

In The

Supreme Court of the United States

October Term, 1997

JOHN MICHAEL CERCEO, *et al.*,

Petitioners,

vs.

WILLIAM E. SHMIDHEISER, III,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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OPINIONS BELOW

The per curiam opinion of the court of appeals (Pet. App. 1 - App. 11) is unpublished, but the judgment is noted at 114 F.3d 1175 (Table). The opinions of the district court and of the bankruptcy court are unreported.

STATEMENT OF THE CASE

This action to set aside a foreclosure sale presents questions of state law — whether the respondent trustee advertised a foreclosure sale in accordance with a Virginia statute, and whether the trustee breached a fiduciary duty under Virginia law by simultaneously serving as trustee and as counsel for a creditor.

In March, 1995, J. Michael Cerceo and U.S. Rt. 29, Madison Project, Inc. (U.S. Rt. 29) filed suit against William E. Shmidheiser, III in the Circuit Court of Madison County, Virginia. After U.S. Rt. 29 filed bankruptcy, the case was removed to the United States Bankruptcy Court for the Western District of Virginia.

The gravamen of the complaint was that Shmidheiser, in his capacity as trustee under a deed of trust on property owned by U.S. Rt. 29, had not advertised a foreclosure sale of the property in accordance with Virginia law, and that as a result the property was sold for an inadequate price. In addition, plaintiffs alleged that Shmidheiser breached a fiduciary duty under Virginia law by serving as both trustee and as counsel for First Union, one of U.S. Rt. 29's creditors.

In October, 1996, the case was tried in the bankruptcy court, which ruled in favor of Shmidheiser on all issues. Petitioners appealed to the district court, which affirmed in a detailed memorandum opinion. The district court ruled that the petitioners had not properly preserved for appeal issues relating to the adequacy

of the price; that Shmidheiser advertised the foreclosure sale in the manner prescribed in Virginia Code § 55-59.2; and that Virginia Code § 26-58 permitted Shmidheiser to act simultaneously as trustee and as counsel for a creditor.

The United States Court of Appeals for the Fourth Circuit affirmed the rulings below. The court agreed that petitioners were precluded from asserting on appeal issues not raised in the bankruptcy or district courts, as well as issues not preserved for appeal from either of the lower courts. (Pet. App. 7). The court also agreed that the Virginia statutes at issue plainly did not support petitioners' claims of improper advertising and breach of fiduciary duty. (Pet. App. 8-10). The Petition for Certiorari followed.

REASONS FOR DENYING THE WRIT

The petition fails to present any compelling reasons to justify granting the writ. It is not asserted, nor could it be, that the decision of the court of appeals is in conflict with that of another court of appeals, or that an important federal constitutional or statutory question is at issue. Instead, the petition merely alleges that Virginia law was misapplied and that the factual findings made below were wrong. Review by this Court is not warranted under these circumstances.

1. Although couched in terms of Virginia "common law", the first question presented by petitioners is simply this: in Virginia, is a trustee under a deed of trust also permitted to act as counsel for a creditor of the grantor? The answer to this question is found in Virginia Code § 26-58, which provides as follows:

> The mere fact that a trustee in a deed of trust to secure a debt due to a corporation is . . . counsel to the corporation, does not disqualify him from exercising the powers conferred by the trust deed nor does it

> render voidable a sale by such trustee . . . so long as he did not participate in the corporation's decision as to the amount to be bid at the sale of the trust property.

Va. Code Ann. § 26-58 (1995).

The uncontradicted evidence at trial was that Shmidheiser did not participate in First Union's decision as to the amount to bid at the foreclosure sale. (J.A. 426).[1] In fact, First Union never even bid at the sale. Moreover, there was no evidence suggesting that Shmidheiser was partial to First Union in any way regarding the sale. These factual findings were not clearly erroneous, and the courts below properly held that there was no breach of fiduciary duty by Shmidheiser.

Petitioners' argument that they were not represented by counsel at the time of the sale is wrong. The record below is replete with communications between Shmidheiser and counsel for the petitioners during the months leading up to the sale. (J.A. 414). Counsel was informed at every stage of the process, and no objections were ever stated to Shmidheiser regarding any matter related to the sale. Indeed, petitioners admittedly were told weeks before the sale that the sale would be conducted by Shmidheiser (J.A. 27), but raised no objection until this litigation commenced. (J.A. 423).

Petitioners' suggestion that Shmidheiser breached his duty by not properly advertising the foreclosure sale has no merit. Under Virginia Code § 55-59.2, a trustee must advertise a foreclosure sale once a week for four successive weeks in a newspaper having a general circulation in the city or county wherein the property to be sold lies. The deed of trust contained the same requirement. It was conceded below by petitioners that Shmidheiser complied with

1. References to (J.A. __) are to the Joint Appendix in the Court of Appeals.

this requirement. (J.A. 355C). Under Virginia law, nothing more was required. *Kriesel v. Berkshire Assocs.*, 452 F.2d 491, 493 (4th Cir. 1971). Even if petitioners' argument was not foreclosed by statute, the evidence established that Shmidheiser conducted additional advertising beyond that contemplated by § 55-59.2 (J.A. 423-24), thereby satisfying any additional requirements sought by petitioners.

In sum, petitioners' disagreement with the result below regarding the breach of fiduciary duty and advertising issues is factbound and does not warrant further review.

2. Petitioners' assertion that the decision of the court of appeals conflicts with that in *Resolution Trust Corp. v. Maplewood Investments*, 31 F.3d 1276 (4th Cir. 1994), not only is wrong but presents issues which were never raised at trial or preserved for appeal from the bankruptcy court to the district court.

In *Resolution Trust Corp.*, the court held that a conflict of interest existed where the trustee participated in the formulation of the bid by the sole bidder at the foreclosure sale. *Id.* at 1282-83. As stated, such action violates Virginia Code § 26-58 and renders the sale voidable. There was no evidence of similar conduct by Shmidheiser; in fact, the evidence conclusively established the contrary. (J.A. 426).

Relying on *Resolution Trust Corp.*, petitioners advance a holder in due course argument under Virginia Code § 8.3A-302. This argument, like many others advanced in the court of appeals, was not made at trial or on appeal to the district court. Therefore, in accordance with well established principles, the court of appeals declined to consider it. (Pet. App. 7-8). *See United States v. One 1971 Mercedes Benz 2-Door Coupe*, 542 F.2d 912, 915 (4th Cir. 1976). This decision was a plainly correct application of settled law and need not be reviewed by this Court.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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